APPELLATE CIVIL.

1907
December 4.

Before Mr. Justice Banerji and Mr. Justice Richards.

MEGHAN DUBE AND ANOTHER (DEFENDANTS) *v.* PRAN SINGH AND OTHERS (PLAINTIFFS).*

Hindu law—Joint Hindu family—Mortgage executed in name of minor—Act No. IX of 1872 *(Indian Contract Act), section* 11*—Civil Procedure Code, section* 562*—"Preliminary point."*

A mortgage in favour of a joint Hindu family is not void because it happens to be executed in the name of a member of the family who at the time of execution is a minor. *Mohori Bibee* v. *Dharmodas Ghose* (1) distinguished.

Held also that the decision of an issue as to whether or not the document which formed the basis of the suit was void in consequence of its having been executed in favour of a minor was a decision on a preliminary point, such as justified a remand under section 562 of the Code of Civil Procedure. *Mata Din* v. *Jamna Das*, (2) followed.

THE facts of this case are as follows:—

The suit was brought by two plaintiffs, who alleged that the defendants Nos. 4 and 5 executed in their favour a usufructuary mortgage on the 4th of June 1893 and put them in possession of the mortgaged property; that the mortgagors subsequently executed another mortgage of the same property in favour of the defendants Nos. 1 to 3 on the 17th of July 1898, and that the subsequent mortgagees dispossessed the plaintiffs. The plaintiffs stated that they were father and son and formed a joint family, and that the mortgage was obtained in the name of one of them who, it is admitted, was on the date of the mortgage a minor. The plaintiffs claimed possession of a portion of the mortgaged property from which they alleged they had been dispossessed and they also claimed damages. In the alternative they asked for a decree for the mortgage money. The suit was defended by the first three defendants, the subsequent mortgagees, who denied that the mortgage set up by the plaintiffs had been executed in their favour. They further denied that the plaintiffs were ever in possession, and pleaded limitation. They also put forward other pleas, to which it is unnecessary to refer for the purposes of

* First Appeal No. 10 of 1907, from an order of Sri Lal, District Judge of Ghazipur, dated the 3rd of August 1906.

(1) (1902) I. L. R., 30 Calc., 539. (2) (1905) I. L. R., 27 All., 691.

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this report. The Court of first instance (Munsif of Ballia) dismissed the claim, holding that the mortgage had not been proved, that even if the mortgage-deed was executed, it was without consideration, and that the claim was time-barred. That Court also found that the mortgage in suit was void as having been executed in favour of a minor. On appeal the lower appellate Court (District Judge of Ghazipur) framed two issues—(1) whether the mortgage-deed in question was executed without consideration, and (2) whether the plaintiffs' suit was barred by limitation. On both these points, as also upon the third question decided by the Court below, the lower appellate Court differed from the Court of first instance. That Court accordingly set aside the decree dismissing the suit and remanded the case under section 562 of the Code of Civil Procedure. From this order of remand the defendants appealed to the High Court.

Munshi *Haribans Sahai*, for the appellants.

Babu *Sital Prasad Ghosh*, for the respondents.

BANERJI and RICHARDS, JJ.—The suit which has given rise to this appeal was brought by two plaintiffs who alleged that the defendants Nos. 4 and 5 executed in their favour a usufructuary mortgage on the 4th of June 1893 and put them in possession of the mortgaged property; that the mortgagors subsequently executed another mortgage of the same property in favour of the defendants Nos. 1 to 3 on the 17th of July 1898, and that the subsequent mortgagees dispossessed the plaintiffs. The plaintiffs stated that they were father and son and formed a joint family, and that the mortgage was obtained in the name of one of them, who, it is admitted, was on the date of the mortgage a minor. The plaintiffs claimed possession of a portion of the mortgaged property from which they alleged they had been dispossessed and they also claimed damages. In the alternative they asked for a decree for the mortgage money. The suit was defended by the first three defendants, the subsequent mortgagees, who denied that the mortgage set up by the plaintiffs had been executed in their favour. They further denied that the plaintiffs were ever in possession, and pleaded limitation. They also put forward other pleas, to which it is unnecessary to refer for the purposes of this appeal. The Court of first instance dismissed

the claim, holding that the mortgage had not been proved, that even if the mortgage deed was executed, it was without consideration, and that the claim was time-barred. On appeal the lower appellate Court framed two issues—(1) whether the mortgage deed in question was executed without consideration, and (2) whether the plaintiffs' suit was barred by limitation. On both these points the Court found in favour of the plaintiffs. The Court of first instance had dismissed the suit on the further ground that the contract of mortgage which was in favour of a minor was void. On this point the lower appellate Court differed from the Court of first instance and held that the ruling of the Privy Council in the case of *Mohori Bibee* v. *Dharmodas Ghose* (1), on which the first Court had relied, was not applicable. The appellate Court accordingly remanded the case to the Court of first instance under section 562 of the Code of Civil Procedure for trial of the other issues which arose in the case, but which had not been determined by the first Court in view of its findings on the issues to which we have referred. From this order of remand the present appeal has been preferred. The first plea raised on behalf of the appellants is that the contract on which the suit is based is void, inasmuch as the mortgagee was a minor at the date of the execution of the mortgage deed. The learned vakil for the appellants relies upon the ruling of the Privy Council referred to above, upon which the Court of first instance had based one of its conclusions. That was a case in which their Lordships of the Privy Council held that a contract made by a minor was absolutely void and not merely voidable. That, however, is not the case here. The contract in this case was made by persons of full age, but the person in whose favour the mortgage deed was executed was a minor. The question of the validity of the mortgage does not in our opinion arise. It was alleged in the plaint that both the plaintiffs were members of a joint family; that the mortgage was made in favour of that family, and that the mortgage deed was executed in the name of one of the members only. There was no specific denial of these allegations by the defendants and the case proceeded on the basis of their correctness. This was therefore a case of a mortgage

(1) (1902) I. L. R., 30 Calc., 539.

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in favour of a joint family and not of a minor. We may also observe that the defendants did not raise the plea in their written statement that the contract was void. That being so, we think there is no force in the first plea taken in the memorandum of appeal.

It is next urged that the Court below ought not to have remanded the case under section 562 of the Code of Civil Procedure, because the Court of first instance has not decided the suit upon a preliminary point. We think the ruling in *Mata Din* v. *Jamna Das* (1), on which the Court below relies, is applicable to the case, and justifies the action of that Court, specially as no new issues have to be framed, but only such of the issues as the first Court left entirely undecided are now to be determined. We dismiss the appeal with costs.

Appeal dismissed.

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FULL BENCH.

Before Mr. Justice Sir George Knox, Mr. Justice Banerji and Mr. Justice Richards.

IN THE MATTER OF THE PETITION OF ANANT RAM AND OTHERS.*

Criminal Procedure Code, section 4 (r)—Act No. XVIII of 1879 (Legal Practitioners Act), section 9 — Mukhtars — Authority of Mukhtar to practice in Criminal Courts.

A mukhtar is not entitled to practise generally and as of right in Criminal Courts, but can act only when he has received the permission of the Court to act in any particular proceeding.

THIS was an application by certain mukhtars practising within the limits of the Meerut Sessions Division asking that an order issued by the District Magistrate of Muzaffarnagar for the guidance of Subordinate Magistrates in that district, and based upon certain remarks made in an appellate judgment by the Additional Sessions Judge of Meerut, might be set aside. The District Magistrate's order as well as the passage in the Additional Sessions Judge's judgment upon which it was founded are quoted below in the order of KNOX, J.

Mr. *C. C. Dillon*, in support of the application, contended that it was not necessary for a mukhtar who had obtained a

* Miscellaneous No. 69 of 1907.

(1) (1905) I. L. R., 27 All., 691.